



# Litigation Update

Litigation Section News

October 2005

## Lawyer is subject to discipline when appearing for a party without that party's consent.

*Bus. & Prof. Code* § 6104 provides that "Corruptly or wilfully and without authority appearing as attorney for a party to an action, or proceeding, constitutes a cause for disbarment or suspension." In *In Re: Marriage of Regan* (Rev. Dept. State Bar Court; August 8, 2005) [2005 DJDAR 9572] the trial court issued a judgment requiring the lawyer as well as his clients to pay the other party's attorney fees. Even though the clients instructed the lawyer that they did not wish to appeal, the lawyer went ahead and appealed on their behalf as well as his own. The Review Department of the State Bar Court affirmed a two year suspension.

## Non-party may be sanctioned for discovery abuse.

A trial court was held to have properly sanctioned a lawyer, who was neither a party, nor an attorney, in a pending case that took advantage of an obvious error in the subpoena for his deposition and for the production of documents in his possession

and, allegedly based thereon, failed to comply with the subpoena. *Sears, Roebuck And Co. v. National Union Fire Ins. Co. (Mousseau appellant)* (Cal. App. Second Dist., Div. 8; August 15, 2005) 131 Cal.App.4th 1342, [2005 DJDAR 9913]. The case also dismissed the lawyer's appeal from his unsuccessful attempts to disqualify the discovery referee who imposed the sanctions because the denial of a motion to disqualify a trial judge is not appealable and may only be reviewed by a petition for extraordinary writ.

## Lawyers are not entitled to fees incurred before confirmation of bankruptcy reorganization plan.

A law firm represented a husband in a dissolution action. A year after the parties entered into a marital settlement agreement, the husband filed for bankruptcy and the bankruptcy court subsequently confirmed a reorganization plan that provided the law firm would be paid if the sale of the husband's house attained a specified sales price. It did not. And the lawyers were out of luck. Not surprisingly, the Court of Appeal held that the lawyers' claim was discharged by the reorganization plan. *Zimmerman, Rosenfeld, Gersh & Leeds LLP v. Larson* (Cal. App. Second Dist., Div. 4; August 17, 2005) 131 Cal.App.4th 1466, [2005 DJDAR 10013].

## Small claims jurisdictional amount may be increased.

AB 1459 (*Canciamilla*) and SB 422 (*Simitian*) would increase the small claims jurisdiction in actions brought by a natural person from \$5,000 to \$7,500. As of this writing, the bill was before the state Senate Appropriations Committee.

**Judicial privilege provides no immunity for assault on litigant.** Where a court appointed discovery referee physically assaulted a litigant, he was not protected by the judicial privilege

even though he claimed he was merely exercising his judicial powers to compel the parties to proceed with a scheduled deposition. *Regan v. Price* (Cal. App. Third Dist.; August 17, 2005) 131 Cal.App.4th 1491, [2005 DJDAR 10071].

**State court filings increase slightly.** The Judicial Council reported that total statewide filings in the superior

## Katrina survivors need your help

**Your legal expertise or other personal services are needed to assist in the recovery and rebuilding of the Gulf Coast.**

Anyone able to contribute their legal skills or other personal services to the Red Cross can contact Mary C. Dollarhide of Paul Hastings, San Diego at [marydollarhide@paulhastings.com](mailto:marydollarhide@paulhastings.com). Please note "American Red Cross/Katrina Legal Support" in the subject line and provide the following information:

1. areas of legal expertise where you might assist the Red Cross (e.g., tax, real estate, licensing, criminal, etc.)
2. names of lawyer volunteers (organized under areas of legal expertise) and jurisdictions in which you are licensed and could provide advice
3. other information you believe may be of use in assisting Red Cross national headquarters.

**This information will be provided to the Red Cross which will in turn contact you.**

## Evaluation of New Civil Jury Instructions:

The Jury Instruction Committee is actively involved in reviewing, and recommending changes to, the new California Civil Jury Instructions. VerdictSearch, a division of American Lawyers Media, is assisting in the solicitation of input and feedback from practicing attorneys who have recently tried cases in California.

If you are interested in reporting on a recent trial in California and providing your feedback on the new CACI jury instructions, [click here](#).

courts increased about three percent during fiscal year 2003-2004. Filings in the Court of Appeal increased by over six percent. Filings in the Supreme Court declined by three percent. The numbers for filings during this period were: Superior Court: 8.8 million (including 189,854 general civil filings and 786,703 limited civil filings); Court of Appeal: 22,824; and Supreme Court 8,564. Although general civil filings represent only 2.2 percent of the trial court filings, they consume 12 percent of the courts' workload. (Judicial Council of California, 2005 *Annual Report*, pp. 23- 27.)

**Motion for attorney fees after appeal must be served and filed within 40 days of notice of issuance of remittitur.** *Cal. Rules of Court*, rule 870.2 (c) (1) provides that a notice of motion to claim attorney fees on appeal must be served and filed "within the time for serving and filing the memorandum of costs under rule 26 (d)." Unfortunately the cross-reference is cause for confusion; the current version of rule 26 (d) found in the published rules specifies when the remittitur is deemed issued but is silent as to the "the time for serving and filing the memorandum of costs." That piece of information may be gained from rule 27 (d) in the current version of the published rules. It provides that the memorandum of costs on appeal must be filed within 40 days after the clerk sends notice of the issuance of the remittitur.

The source of this confusion is explained in footnote 5 in *In Re: Marriage of Freeman* (Cal. App. Second Dist., Div. 4; August 22, 2005) 132 Cal.App.4th 1, [2005 DJDAR 10239], where the court states: "Rule 26...was formerly numbered 27, and still appears under that designation in the published Rules of Court. It was renumbered by action of the Judicial Council, operative January 1, 2005 (See Disposition Table at the beginning of Title One of Appellate Rules.)"

**Vexatious litigant may be liable for attorney fees.** When litigants have been declared "vexatious" the court may require them to post security. The amount of security may include attorney fees to be incurred by the defendant because the vexatious litigant statute (*Civ.Proc.* §§ 391 ff.) provides an independent statutory basis for awarding attorney fees to a defendant forced to defend an action brought by a vexatious litigant. *Singh v. Lipworth* (Cal. App. Third Dist.; August 23, 2005) 132 Cal.App.4th 40, [2005 DJDAR 10315].

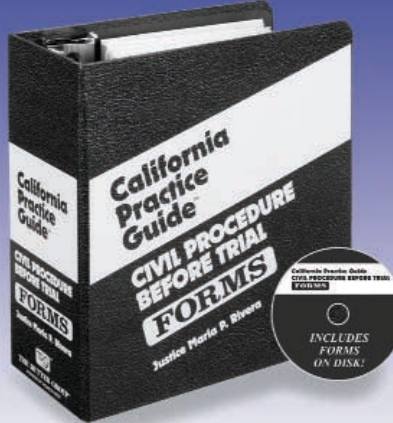
**Immunity protects law enforcement officials from liability for mistaken incarceration.** *Gov. Code* § 845.8 entitled defendants to summary judgment where they had incarcerated plaintiff for almost a month based on a mistake in identifying a parole violator. *Perez-Torres v. State* (Cal. App. Second Dist., Div. 3; August 3, 2005)

(ord. pub. August 24, 2005) 132 Cal.App.4th 49, [2005 DJDAR 10347] – the case also contains a useful discussion of the principles of res judicata.)

**A defendant contesting personal jurisdiction must file a motion to quash before taking any action relating to the merits of the action.** *Code Civ. Proc.* § 418.10 authorizes a motion to quash service of summons within the time allowed for filing a response to the complaint. *If the motion is timely made*, "no act" by the party making such a motion, "including filing an answer, demurrer, or motion to strike," shall be deemed to be a general appearance. (§ 418.10 (e) (10)). But this does not mean that a defendant can necessarily wait until the filing of the responsive pleading to file a motion to quash. Any action relating to the merits of the case, before the motion is filed, constitutes a general appearance. *Factor Health Management v. Sup.Ct. (Apex Therapeutic Care, Inc.)* (Cal. App. Second Dist., Div. 1; July 29, 2005) (ord. pub. August 29, 2005) 132 Cal.App.4th 246, [2005 DJDAR 10613] – seeking discovery to oppose a preliminary injunction before filing a motion to quash, constitutes a general appearance.


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